

No. 11962

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

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PROCTER & GAMBLE MANUFACTURING Co.,

*Appellant,*

*vs.*

H. F. METCALF, *et al.*,

*Appellees.*

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APPELLANT'S REPLY BRIEF.

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## APPELLANT'S REPLY BRIEF.

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### Preliminary Statement.

The only reply brief filed herein in opposition to *Appellant's Opening Brief* was filed on behalf of certain unsecured creditors of the bankrupt corporation and on behalf of the bankrupt corporation itself. Neither the Trustee in Bankruptcy nor the Bank of America National Trust and Savings Association, a substantial unsecured creditor who opposed appellant before the Referee and before the District Court, have filed briefs herein in opposition to this appeal. Accordingly, references hereinafter made to appellees or the brief filed on their behalf will have reference to appellees Dorothy Day, *et al.*

I.

APPELLEES' STATEMENT OF FACTS.

A. Appellees' "Primary" Ground of Objection.

Appellees now state that "If 'adequacy of price' were the sole or primary objection made by appellees to the proposed sale the matter would not be so serious." (Reply Br. p. 5.) Appellees apparently assert that the alleged detriment to the other assets of the estate constitutes their primary objection. This, however, does not improve their position.

The claim of detriment to the balance of the estate is based primarily on evidence that the reversion plus the royalties under the lease are of greater value than the royalties alone. This is so obvious as to require no evidence and has been conceded by appellant from the start. It amounts to a mere assertion of inadequacy of price, and it is on that basis that we regarded it in our opening brief.

If, however, we regard the detriment to other assets of the estate as being something different than an objection on the ground of inadequacy of the price, the objection is governed in any event by the same principles of law as inadequacy of price, which principles have been discussed in *Appellant's Opening Brief* and are further discussed at a later point herein.

## B. The Date of the Appraisal.

At several points appellees refer to the fact that the appraisal by the appraiser appointed by the Referee was made almost two years before the sale. (See for example: Reply Br. pp. 30 and 39.) Any significance which might otherwise attach to this is nullified by the fact that appellees' own witness, Harry C. Higgins, testified that the value of the property was the same on January 30, 1946, and November 13, 1947. [Tr. p. 103.] In addition, the record does not disclose any request by appellees for a reappraisal, which would have been the proper course if appellees honestly believed there had been any substantial change in the value of the property.

## C. The Real Estate Broker's Commission.

Apparently appellees do not question the proposition advanced by appellant that if any error exists in the order by reason of the allowance of a broker's commission to Joseph Sattler, it is a matter for modification and not a matter for reversal. (See: Reply Br. p. 46.) Consequently we do not wish to labor the point, but perhaps should call attention to the holding in *Aetna Casualty & Surety Co. v. Catskill Nat. Bank & Trust Co.*, 102 F. 2d 527, 530 (C. C. A. 2, 1939), where it was held that since the case was tried without a jury and the facts were fully developed, a minor error in the judgment might be corrected, and also to the enlarged jurisdiction of Courts of Appeals in ". . . proceedings in bankruptcy . . . to review, affirm, revise, or reverse both

in matters of law and in matters of fact.” (11 U. S. C. A. Sec. 47.)

Appellees' make the point that in the *Petition for Authority to Sell and Confirmation of Sale* [Tr. p. 7] "No authorization was sought for the payment of a real estate broker's commission . . ." (Reply Br. p. 8.) Appellees preface this assertion with a *partial* summary of the prayer, but neglect to mention that portion thereof praying that out of the proceeds of the sale petitioner be authorized to pay:

“(c) All other expenses incident to the consummation of said sale pursuant to said offer.”

and the prayer for general relief:

“7. For such other and further relief as may be proper.”

Under the circumstances we think there was a sufficient basis in the petition to support the order.

On this question of the propriety of payment of a commission, it should be noted that Counsel for appellees took part in the discussion of the question before the Referee but made no formal objection to the payment of a commission at that time. [Tr. pp. 290-291.]



II.

APPELLEES' ARGUMENT.

A. The Order of the Referee in Bankruptcy Was an Actual Confirmation of the Sale, and the Order of the District Court Was to Reverse, Vacate and Set Aside the Referee's Order.

Appellees make the contention in their brief that "Appellant has in error assumed that the proposed sale was 'confirmed' by the Referee's Order . . ." (Reply Br. p. 35.) However, the following references to the transcript clearly show that the Referee did in fact confirm the sale, and that the issue before the District Court was whether to affirm or reverse the confirmation, and not whether to confirm a proposed sale:

(1) On October 27, 1947, the Trustee in Bankruptcy filed a *Petition for Authority to Sell and for Confirmation of Sale of Real Property to the Procter & Gamble Manufacturing Co., a Corporation*. [Tr. p. 7.] The prayer of the petition was, in part:

"3. That the sale of real property to Procter & Gamble Manufacturing Co., a corporation, be approved and confirmed, Subject to the conditions set forth in the offer as hereinbefore set forth." [Tr. p. 10.]

(2) On December 19, 1947, after conducting hearings on this petition over a period of several days, the Referee made his *Findings of Fact, Conclusions of Law and Order* [Tr. p. 26], and ordered, among other things, as follows:

"2. That the sale of said real property, subject to said reservations, conditions, easements, restrictions and taxes, as hereinbefore noted, to the Procter & Gamble Manufacturing Co., a corporation, for

the sum of \$198,000, be and it is hereby confirmed, subject, however, to the following additional conditions:

“

“(c) That this order confirming and approving this sale shall become final within sixty (60) days from October 27, 1947, provided, however, that the purchaser may waive this condition in its discretion.” [Tr. pp. 32-33.]

(3) On December 29, 1947, appellees represented by their same counsel filed a *Petition to Review Referee's Order* [Tr. p. 36], and the prayer of the petition in its entirety was as follows:

“Wherefore, your Petitioners pray for a review of said order by the Judge and that said order be vacated and set aside.” [Tr. p. 47.]

(4) On May 10, 1948, the District Court made its *Order Vacating and Setting Aside Referee's Order of December 19, 1947, re Sale of Real Property to Procter & Gamble Manufacturing Company* [Tr. p. 91], and the District Court decreed as follows:

“Now, therefore, It is Ordered, Adjudged and Decreed by the Court:

“That said order of the Referee in Bankruptcy herein, dated December 19, 1947, confirming the sale of the real property described therein, to Procter & Gamble Manufacturing Company is reversed, vacated and set aside.” [Tr. p. 94.]

The fact that the Referee had jurisdiction to actually confirm this sale, and the fact that the District Court was in a position of an appellate judge reviewing a sale already confirmed, is fully supported by the decision in *In re Realty Foundation, Inc.*, 75 F. 2d 286 (C. C. A. 2d, 1935). (See: App. Op. Br. pp. 23-24.)

**B. The Rule Relative to Setting Aside Confirmed Sales and the Rule Relative to the Stability of Judicial Sales Have Full Application to the Instant Case.**

Appellees make the contention in their brief that the above mentioned rules have "been repeatedly held not to have application to the approval or disapproval of a sale in bankruptcy until, following action by the referee, the District Court acts upon the matter." (Reply Br. p. 35.) However, the authorities hold that the foregoing rules are applicable at any time after actual confirmation of the sale. If the sale is actually confirmed, then the rules are applicable on a motion before the Referee to vacate the confirmation or on a Petition to Review before the District Court, and failure of the Referee or the District Court to follow such rules is reversible error.

*In re Burr Mfg. & Supply Co.*, 217 Fed. 16 (C. C. A. 2d, 1914) (App. Op. Br. pp. 24-26);

*Allen v. Union Transfer Co.*, 152 F. 2d 633 (C. C. A. 10th, 1945); cert. den. 327 U. S. 807 (1935) (App. Op. Br. pp. 26-27);

*In re Hoffman*, 16 F. 2d 939 (D. C. Pa., 1927) (App. Op. Br. pp. 33-34);

*In re Pneumatic Tube Steam Splicer Co.*, 60 F. 2d 524 (D. C. Md., 1932) (App. Op. Br. pp. 34-35).

The principal decision relied on by appellees in support of their contention that the foregoing rules are not applicable to the instant case is *Reid v. King*, 157 F. 2d 868

(C. C. A. 4th, 1946). In this case, the Court directed the Trustee in Bankruptcy to sell certain assets of the Bankrupt estate, subject, however, to confirmation by the Court. The Trustee solicited sealed bids, and agreed to accept the highest bid made "subject to confirmation by the Court which might reject all offers." A person named Reid made the highest bid, but before the Trustee filed his report of the sale to the Referee, a person named King who had full knowledge of the previous sale but had not submitted a bid, made an offer to the Trustee totaling *35% more* than the bid made by Reid. At the hearing before the Referee for confirmation, the Referee asked for a bid higher than King's bid, and when no such bids were received, the Referee ordered King's bid accepted. This order was affirmed by the District Court. Reid appealed and the Court of Appeals affirmed. The Court held that since there had been no confirmation of Reid's bid, the Referee could confirm King's bid even though Reid's lower bid was not grossly inadequate. The Court makes a clear distinction between the rules applicable to the facts of that case where a sale has been made by the Trustee subject to confirmation by the Referee so that the Referee has before him the propriety of confirming the sale, and the rules applicable to setting aside a completed sale. If the Referee had already confirmed Reid's lower bid at the time King's higher bid was received, it is evident that the Court would have held in all probability that it was reversible error to vacate the confirmed sale to Reid. However, in the instant case there has never

been a firm bid in excess of appellant's offer, and thus the *Reid* case is not applicable in any event.

It is interesting to note that even before confirmation, this Circuit has held that a slightly higher bid made at the hearing on confirmation is not sufficient to require the Referee to refuse to confirm a private sale for a lesser amount theretofore made, even though the sale was subject to confirmation by the Referee. *Prentice v. Boteler*, 141 F. 2d 175 (C. C. A. 9, 1944) (App. Op. Br. pp. 35-36). It is also interesting to note that the Court of Appeals for the 4th Circuit has held that it is an abuse of discretion for the Bankruptcy Court to confirm a bid of about 10% more than the high bid received at a public auction, but not yet confirmed, in the absence of unfairness, fraud, mistake or gross inadequacy of price. *In re Stanley Engineering Corporation*, 164 F. 2d 316 (C. C. A. 3rd, 1947); cert. den. 68 Supreme Court 351 (1948) (App. Op. Br. pp. 36-38). However, it is not necessary in this case to consider whether *Reid v. King*, *supra*, is conflicting with the *Prentice* and *Stanley* cases, *supra*, inasmuch as all three of the cases recognize that *after confirmation*, the rule that a sale will not be vacated in the absence of fraud, accident, or mistake sufficient to avoid a sale between private parties, or such gross inadequacy of price as to raise a presumption of fraud, is fully applicable.



C. The District Court Had Discretion to Reverse the Order of the Referee Confirming the Sale Only on a Showing of Fraud, Accident or Mistake Sufficient to Avoid a Sale Between Private Parties, or Such Gross Inadequacy of Price as to Raise a Presumption of Fraud, and a Decision Not Based on Such a Showing Should Be Reversed on Appeal.

Appellees' brief does not contend that a showing within the above rule was made at the hearing before the District Court, and the transcript of the proceeding makes it evident that no such showing was made. (See: App. Op. Br. pp. 18-21.) Thus, since the rule above stated is applicable to the instant case, the ruling of the District Judge should be reversed and the Order of the Referee reinstated.

The only cases cited in Appellees' brief which are claimed to be in opposition to the above rule, in addition to the case of *Reid v. King, supra*, are the two cases analyzed hereinbelow.

In *Currin v. Nourse*, 66 F. 2d 137 (C. C. A. 8, 1933), the Trustee in Bankruptcy made a private sale of certain assets of a bankrupt estate pursuant to authority given by the Referee in Bankruptcy. The sale was confirmed by the Referee at a general creditors meeting, although the unsecured creditors did not have an opportunity to review the contract of sale and the Referee refused their motion for a continuance to give them an opportunity to review the contract. Thereafter, the unsecured creditors made a motion before the Referee to vacate the confirmation, but this motion was denied. A petition was filed by the unsecured creditors with the District Court

to review the decision of the Referee, but the District Court affirmed the Referee's order. The unsecured creditors appealed, and the Court of Appeals reversed, holding that the Referee should have granted the unsecured creditors an "opportunity to examine the contract of sale and have given them a reasonable time to be heard." The court held there was an abuse of discretion under these circumstances sufficient to justify remanding the case so that all parties were restored to the positions they occupied prior to the confirmation, and in addition, the Court directed the Referee to give a full and fair hearing to all parties.

It is evident that the foregoing decision (to be distinguished from a subsequent decision in the same matter cited in Appellant's opening brief, pages 31-33) is entirely proper on its facts, and that the decision does not in any respect support Appellees' contention that the rule hereinabove mentioned is inapplicable to the instant case. It is not even contended in the instant case that Appellees failed to get access to all pertinent documents and information, or that Appellees were deprived of their right to a full and fair hearing.

The other decision relied upon in Appellees' brief is *In re Wolke Lead Batteries Co.*, 294 Fed. 509 (C. C. A. 6th, 1923). In this decision the bankrupt estate owned real property appraised by the Court Appraiser at \$18,000. The property was offered for sale by the Trustee, and a person named Haag filed a sealed offer for \$2,000, but when the bids were opened, Haag raised his bid to \$12,000. The Trustee accepted this latter bid and reported it to the Referee for confirmation. Exceptions to the confirmation were filed and prior to the time Haag's bid

was confirmed, a person named Knight bid \$13,000 for the property. At the hearing on confirmation of Haag's offer, the Referee overruled the exceptions and confirmed the sale to Haag even though Knight had made a higher offer. On review before the District Court, the Referee's decision was reversed and the District Court ordered a resale of the property. At the resale, the Trustee accepted the high bid made by Knight for \$13,500, and Haag thereupon turned the property over to Knight and filed a petition asking for \$820.40 which he had expended in preserving and improving the property prior to the District Court's ruling. At the hearing before the Referee to confirm this sale to Knight, Haag's objections to the sale were overruled, the sale to Knight was confirmed, and Haag's claim for \$820.40 approved. This was affirmed by the District Court, and on appeal, the Court of Appeals also affirmed. The Court stated that the original confirmation of the sale to Haag by the Referee was subject to review by the District Court since Haag's bid was for less than 75% of the appraised value of the property, and that the District Court properly exercised its discretion in reviewing and reversing the Referee's Order under the circumstances. In addition, the Court held that Haag was in any event estopped from insisting on a reversal due to his petition to recover the \$820.40 expended by him in preserving and improving the property.

From the foregoing, it is clear that the *Wolke* case is to be distinguished from the instant case; first, because in the instant case there was an actual confirmation by the Referee of an offer in excess of 75% of the appraised value of the property which did not require and which



was not subject to review by the District Court (except on a Petition for Review putting the District Court in the position of an Appellate Court), whereas, in the *Wolke* case, the confirmation by the Referee was of necessity and pursuant to law subject to approval by the District Court; and secondly, the *Wolke* decision is to be distinguished from the instant case by the estoppel feature of the decision.

### Conclusion.

For the reasons set out herein and in *Appellant's Opening Brief* the *Order Vacating and Setting Aside Referee's Order of December 19, 1947, Re Sale of Real Property to Procter & Gamble Manufacturing Company*, made by the District Court, should be reversed and the Referee's Order of December 19, 1947, confirming the sale of real property should be affirmed.

Respectfully submitted,

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